NTSB Order No.
EM No. 104

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 21st day of December, 1983

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

WILLIAM LEON GRAVES, Appellant.

Docket ME-96

OPINION AND ORDER

Appellant seeks review of a decision of the Commandant (No. 2298, dated April 6, 1983) affirming an order entered by Administrative Law Judge Thomas E. P. McElligott on July 23, 1980, following an evidentiary hearing held on July.[1] By that order the law judge revoked appellant's Merchant Mariner's Document (No. 450-04-0880) and License (No. 15886) on finding proved the charge that he had been convicted in as state court of record for possession of marijuana in a quantity of more than four ounces. [2] As we find no reversible error in the Commandant's decision, it will be affirmed.[3]

On appeal to the Board the appellant, represented by counsel, has adopted without modification the brief he filed with the Commandant on appeal from the law judge's order. As a technical matter, therefore, the brief fails to cite for Board review any error in the Commandant's decision. Nevertheless, to the extent that the appeal to the Board reflects appellant's disagreement with Commandant's rejection of his two main objections to the law judge's decision, we have reviewed those objections and have, like the Commandant, found them unpersuasive, though for different

[1] Copies of the decisions of the Commandant and the law judge are attached.

[2] Under 46 U.S.C. 239b, the Commandant has discretionary authority to revoke the documents of a seaman who has been convicted of a narcotic drug offense in certain courts of record.

[3] The Commandant has filed a reply opposing the appeal.

reasons in respect to one of the two contentions.

Specifically, we find no error in the Commandant's conclusion to the effect that the state court record, bearing the court clerk's attestation and seal, introduced to establish a conviction of a drug law violation in Texas constituted reliable, probative and substantial evidence without an additional certificate from the state court judge vouching the correctness of the clerk's attestation.[4] As to the Commandant's view that consideration of a sanction less than revocation for the charge found proved would not be consistent with the statute, we must once again register our disagreement.[5] At the same time, we have concluded that the Commandant's failure, based on his erroneous construction of 46 USC,[6] expressly to consider a lesser sanction does not, in the circumstances of this case, mandate either a remand of the matter for such consideration or a reversal of the order of revocation.

Although 46 USC 239(b) requires the Commandant to give consideration to a sanction of less than revocation, it not follow, as the appellant appears to believe, that the Coast Guard could not properly adopt a regulation which would operate to deprive its law judges of the authority to impose a sanction other than revocation in a proceeding under that statute.[7] In our judgment, the relevant

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[4] The additional certification is required under 28 U.S.C. § 1738 in order to authenticate such records for use in certain judicial proceedings. The Commandant found the requirement inapplicable to an administrative hearing under the Administrative Procedure Act.

[5] The Board has always construed the permissive language of 46 U.S.C. 239 as investing the Coast Guard with the discretion to impose not just a sanction of revocation but also a lesser sanction where the court conviction on which the administrative action was predicated involved a minor or petty drug law violation. See, e.g., Commandant v. Beroud, 2 NTSB 2742 (1975).

[6] The legislative history cited by the Commandant on page 5 of his decision contains no support for the assertion that revocation is the only sanction permitted under the statute.

[7] 46 CFR § 5.03-10 provides, in part, that:

> "(a)After proof of a narcotics conviction by a court of record as required by Title 46, U.S. Code, section 239b, ... the Coast Guard may take action based upon this conviction. After proof of alleged conviction or plea of 'guilty,' the administrative law judge shall

inquiry is not whether the authority of the Coast Guard's law judges may be so circumscribed, but, rather whether the Coast Guard's procedures allow the opportunity for sanctions other than revocation to be considered. That inquiry, it seems to us, must be answered in the affirmative, since the Commandant has reserved authority "to reverse, alter or to modify the decision of the administrative law judge."[8]

We recognize that the Commandant has not in this case expressly undertaken to consider whether some sanction short of revocation would be appropriate. He has however, reviewed the circumstances of the underlying state conviction and all other evidence furnished by the appellant for purposes of determining whether it would be consistent with the intent of the statute to impose no sanction at all. That review persuaded the Commandant that revocation was warranted. Our examination of the record with the possibility in mind that a lesser sanction might be appropriate convinces us that an order of revocation is warranted and accordingly that the Commandant's decision should be sustained.

Possession of more than four ounces of marijuana is presently the most serious offense involving that drug chargeable under Texas law, and such possession is classified as a third degree felony. [9] An individual convicted of that offense may be imprisoned for up to 10 years and fined as much as $5,000.[10] It is thus clear that

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> enter an order revoking the seaman's license, certificates, and documents."

[8] 46 CFR § 5.30-10.

[9] How much more than four ounces was involved in this incident is not addressed in the record. The Commandant's observation that "This greatly exceeds the amount I would except a first-time experimenter would possess" (Decision at 5) appears to assume that little more than four ounces were involved in this arrest and conviction. We cannot say whether that assumption is valid. What is clear is that the charge against the appellant under Texas law would have been the same whether the actual amount of the drug in his possession had been five ounces or five tons. See Vernon's Ann. Civ. St. Art. 4476-15.

[10] Appellant was sentenced to five years in prison, though imposition of the sentence was suspended and he was placed in "Adult Probation" for five years. See Coast Guard Exh. 3. Appellant at his Coast Guard hearing maintained that he served roughly three months in a rehabilitation center under this sentence, i.e., from December 7, 1979 to March 4, 1980. See Tr. at

appellant's conviction was not based on some minor infraction of state law, but was, rather, predicated on his possession of an amount of marijuana which the state deems felonious and which the Commandant, correctly, we believe, finds to be more than would be possessed by a first-time user or someone merely experimenting with the drug. In these circumstances we are unable to conclude that the Commandant abused his discretion in affirming the revocation order entered by the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal is denied; and

2. The Commandant's order affirming the law judge's order revoking appellant's seaman's documents and licenses is affirmed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, McADAMS, BURSLEY and ENGEN, Members of the Board, concurred in the above opinion and order.

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